COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

RE: INCREASING THE PENETRATION RATE FOR DISCOUNTED ELECTRIC, GAS AND TELEPHONE SERVICE **DTE 01-106**

RESPONSE OF THE MASSACHUSETTS COMMUNITY ACTION PROGRAM DIRECTORS ASSOCIATION AND THE MASSACHUSETTS ENERGY DIRECTORS ASSOCIATION TO NSTAR MOTION FOR RECONSIDERATION OR CLARIFICATION

I. INTRODUCTION

On August 28, 2003, several regulated distribution companies that do business under the name "NSTAR Electric" ("NSTAR" or "the Company") filed a "Motion for Reconsideration (in Part) or in the Alternative, Motion for Clarification." NSTAR seeks reconsideration or clarification of the Department's August 8, 2003 Order in this docket ("Order"). In essence, NSTAR argues that the Department:

(1) must investigate "the costs involved and the bill impacts for customers who will subsidize the discount rate [and] the development of a mechanism to allow for cost recovery," prior to implementing the "computer-matching program" described in the Order (NSTAR Motion, at 1); and

(2) should clarify the timing of implementation of the Order, including when jurisdictional companies must begin sharing data with the Executive Office of Health and Human Services ("EOHHS") and when companies must notify their customers of the right to opt-out of having their names or other information shared with EOHHS.

The Massachusetts Community Action Program Directors Association and the Massachusetts Energy Directors Association (collectively, "MASSCAP") oppose the motion to reconsider the Order, to the extent that it seeks a revised order that would postpone

implementation of computer matching until resolution of a cost-recovery mechanism. Regarding NSTAR's motion for clarification, MASSCAP does not believe NSTAR has a right to clarification, under the standards articulated in prior cases, but MASSCAP also does not oppose the Department clarifying the timetable for certain steps that electric and gas companies must take.

II. THE DEPARTMENT HAS THE CLEAR LEGAL AUTHORITY TO ADOPT THIS ORDER

At the outset, it is important to emphasize that the no party has questioned the authority of the Department to adopt the Order in this case. The Restructuring Act provides direct authority for the Department to establish "an automated program of matching customer accounts with lists of recipients of . . . means tested public benefits programs." G.L. c. 164, § 1F(4)(i). Neither NSTAR nor any other party challenges the Department's authority to implement this Order.[1]

III. NSTAR HAS NOT ESTABLISHED SUFFICIENT GROUNDS FOR RECONSIDERATION, NOR HAS NSTAR SHOWN ANY HARM THAT WOULD MERIT THE DEPARTMENT RECONSIDERING ITS PRIOR ORDER

NSTAR correctly cites the Department's standard for reconsidering previously decided issues. As NSTAR notes (Motion, at 2), reconsideration is granted "only when extraordinary circumstances dictate that the department take a fresh look at the record." As NSTAR further notes (*id*.), a "motion for reconsideration should bring to light previously unknown or

[1] As Commissioner Connelly's dissent notes, "Thus, *there is no dispute* as to the lawfulness of using utility companies' rates for the social or charitable end of subsidizing service to low-income customers."

undisclosed facts that would have a significant impact upon the decision already rendered."

NSTAR has not specified the circumstances that it considers "extraordinary" nor has it brought to light any "previously unknown or undisclosed facts." Its motion to reconsider fails to meet the very standards it cites, and should be denied. The essence of NSTAR's argument is that it may incur increased costs, should a large number of new customers be enrolled under the Order, but that the Department has not yet established the precise mechanism through which it can recover any increased costs.[2] This argument relies on facts explicitly recognized in the Order.[3] NSTAR is simply re-raising issues already addressed.

Further, NSTAR has not alleged any real harm from the Order. The Department noted that:

> it will take approximately one year from the date agencies *begin* using applications with language authorizing the release of eligibility information to utilities to implement the computer matching program. In the interim, the Department will require utilities to continue *current* enrollment procedures.

Order, at 10 (emphasis added).[4] Thus, it will likely be more than one year before NSTAR would experience any rate impact from this Order. EOHHS will have to revise its application forms, obtain signed waivers from all of its clients, finalize the data matching and data transfer protocols that will be used, and send NSTAR lists of eligible households before NSTAR would have to add new customers to the low-income discount. Any revenue impact is relatively far in the future.

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[2] See, for example, Motion, at 5, 8.

[3] Order, at 13 ("The Department is aware that utilities may incur a decrease in revenue relating to the computer matching program resulting from higher participation in discount rates").

[4] NSTAR, which has attended all of the working meetings, was likely aware of this fact prior to release of this decision, as EOHHS made it clear that the process would take some time.

The Department has clearly stated that it "will consider proposals for rate recovery based on increased expenses resulting from the computer matching program in a second phase" of this proceeding. Order, at 13. It has set October 9, 2003, a date only six weeks after NSTAR filed its motion, as a technical session to discuss cost-recovery and other issues. *Id.* NSTAR has not shown any "extraordinary circumstances" or provided any "previously unknown or undisclosed facts" that would show that the Department's proposed approach is illegal or should be reconsidered.

Even were the Department to reconsider the Order, in the sense of giving it a serious second look with an open mind to adopting NSTAR's request, that request should be rejected as unfounded in law. NSTAR provides no legal authority for the proposition that the Department cannot implement an order that may have cost impact in the future unless it first quantifies the cost and develops a cost-recovery mechanism. Rather, NSTAR urges the Department to resolve cost-recovery issues first because "the Order did not rely on an evidentiary record regarding the cost and bill impacts to [other] customers" and because of speculation that "electric and gas companies [may] incur costs that may not be recoverable." Motion, at 4, 5.

As to the alleged lack of an evidentiary record, this is not an adjudicatory proceeding in which the Department must take evidence in the manner NSTAR asserts. *See Cambridge Electric Light Co. v. DPU*,, 363 Mass. 474, 487 (1973)(proceedings not adjudicatory; "No purpose would have been served by importing formal litigious procedures"). As the Court noted in *Cambridge*, 363 Mass. at 488, "[a]ny constitutional claim to a trial type hearing fails if the proceeding was indeed regulatory or legislative or political." The Department simply was not

obliged to hold evidentiary hearings on speculative, future decreases in revenues.[5]

The *Cambridge* case is particularly instructive in regard to NSTAR's claim that it will incur costs that will not be recovered. There, utility companies challenged the Department's initial adoption of billing and termination regulations. The companies "complain[ed] that the regulations will result in 'confiscation' of their 'property'" by "decelerating cash flow," increasing write-offs, and otherwise increasing expenses, 363 Mass. at 498-499, a claim not unlike NSTAR's claim that increased discount enrollment will decrease revenues. However, the Court noted that:

> the forecast [of higher costs and lesser cash flow] is a speculative and unquantified one; against it are to be set the beneficial objects of the regulations as the department might see them. If the predicted results are realized at all, one would expect them to be reflected on the books of the several companies in different ways and to different degrees. The dollars and cents figures would then enter into the calculations which are presented at rate making proceedings and become the basis for rate adjustments. *The regulations cannot be condemned beforehand as confiscatory.*

Id. (emphasis added). Here, as in *Cambridge*, there is nothing illegal about adopting policies that apply to all gas and electric companies and that will impose costs, without first establishing a cost-recovery mechanism. The Department has in the past issued orders that apply to regulated companies and that may impose costs without first adopting cost-recovery mechanisms. *See, e.g., Investigation Re: Service Quality Standards*, DTE 99-84 (August 17, 2000)(requiring companies to meet standards for customer service, safety, and reliability and mandating extensive data collection and reporting obligations); *Investigation Re: Response of Western Massachusetts Electric Company to the Storm of July 15, 1995*, DPU 95-86 (October 25, 1985)(ordering company to make changes to it emergency plans, including: availability of trucks and distribution

system components; expanded use of outside crews; conducting additional storm simulations; etc.) NSTAR cites no case for the contrary proposition that the Department must first establish cost-recovery mechanisms before imposing new obligations on utility companies.

MASSCAP notes that it has not opposed companies recovering the cost of making discount rates available. In its initial January 31, 2002 Comments, at 29, MASSCAP noted that if this docket succeeds in leading to greater discount enrollment, "the total cost of the discount programs will increase." MASSCAP further noted that "gas and electric companies face financial disincentives to increasing enrollment." *Id.* However, NSTAR's motion does not provide a proper basis for reconsidering the Order and postponing implementation of computer-matching until cost-recovery issues have been resolved. The Order already provides a reasonable mechanism for addressing the issue of cost recovery.

IV. WHILE THE DEPARTMENT IS NOT REQUIRED TO ISSUE ALL OF THE CLARIFICATION SOUGHT, MASSCAPDA DOES NOT OPPOSE IT

NSTAR seeks clarification that electric and gas companies will begin:

> sharing of customer data with the EOHHS via a computer matching program only after the following actions occur: (1) the EOHHS notifies the Department that it has revised its applications for income-eligible governmental programs under its jurisdiction . . . and has received permission from such clients to have their client status disclosed to electric and gas companies; [and] (2) the electric and gas companies notify their customers of the opportunity to opt-out of sharing their customer data with the EOHHS.

Motion, at 5.[6]

MASSCAP finds the first condition a little baffling. The Department has specifically

[6] NSTAR also added a third caveat that the "Department [first] issues a final order(s) regarding how electric and gas companies will recover costs relating to implementing the Order," *id.* For the reasons noted in its discussion of NSTAR's motion to reconsider, *supra*, MASSCAP opposes delaying computer-matching until there is a final order on cost recovery.

noted that it entered into a Memorandum of Understanding with EOHHS to insure that EOHHS agencies first "include language on future applications authorizing the agencies to share eligibility information with utilities" before matching will occur. Order, at 10, n. 4. To make this even clearer, the Department added that "[i]n the interim [i.e., until the EOHHS completes the task of obtaining client authorization], the Department will require utilities to continue current enrollment procedures." Order, at 10. It is hard to imagine the Department more clearly stating that utilities need only continue to do what they have been doing ("continue current enrollment procedures") until EOHHS has obtained it has received permission from its clients to release information. MASSCAP thus sees no requirement for that the Department must issue clarification. However, MASSCAP is interested in utility companies being as cooperative as possible with the computer-matching program. To the extent that NSTAR has lingering concerns that EOHHS might violate the privacy rights of its clients or otherwise violate any privacy laws, MASSCAP does not oppose clarification.[7]

Second, NSTAR seeks clarification that it need not send opt-out notices until "EOHHS provides notification to the Department that it is ready to receive customer data from the electric and gas companies pursuant to the Order." Motion, at 8. MASSCAP does not oppose a clarification that companies are not required to issue opt out notices "in the near term," NSTAR's

[7] By not opposing this clarification, MASSCAP does not mean to imply that the regulations and statute NSTAR cites (Motion, at 6) in any way preclude the sharing of data proposed in the Order. See MASSCAP's "Additional Response to June 19, 2003 Briefing Question" (July 21, 2003), at 3-5 (addressing privacy issues). MASSCAP further notes that the clarification as sought (". . . unless and until the EOHHS and DTA certify have notified the Department that they have sufficient permission to share their client data with the electric and gas companies," Motion, p. 7) conditions the Department's Order on a companion state agency making a certification to the Department. While EOHHS may well be willing to so certify, the Department has no authority to require EOHHS to do so.

apparent concern. Motion, at 7. MASSCAP agrees that sending out notices too far in advance of actual matching makes little sense. However, if the opt-out notices do not issue until the point where EOHHS is ready to accept data from the companies, this is likely to provide too little time for customers to respond. MASSCAP therefore suggests that the Department further address this issue at the technical session scheduled for October 9, 2003, as parties other than NSTAR and MASSCAP may have useful opinions on the mechanics of sending opt-out notices. This is precisely the type of issue that a technical session can productively resolve.

V. CONCLUSION

For the reasons stated, MASSCAP believes that NSTAR's motion to reconsider should be denied, to the extent that the motion would require the Department to establish a cost-recovery mechanism as a condition precedent to implementing computer-matching. MASSCAP does not oppose NSTAR's motion for clarification of timing issues, although it believes that the timing of sending opt-out notice would be best resolved in the workshop that has already been scheduled for October 9.

Respectfully submitted,

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